

** § 362 INFORMATION COVER SHEET **

Schulte Properties LLC _____
DEBTOR _____

Bayview Loan Servicing, LLC., as servicer for THE
BANK OF NEW YORK, AS TRUSTEE ON BEHALF OF
THE CERTIFICATEHOLDERS CWALT, INC.,
ALTERNATIVE LOAN TRUST 2004-36CB MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2004-36CB
MOVANT

18-12734-mkn _____

Case No: _____

MOTION #: _____

CHAPTER: 11 _____

Certification of Attempt to Resolve the Matter Without Court Action:

Moving counsel hereby certifies that pursuant to the requirements of LR 4001(a)(2), an attempt has been made to resolve the matter without court action, but Movant has been unable to do so.

Date : November 6, 2018

Signature: /s/ Arnold L. Graff

Attorney for Movant

PROPERTY INVOLVED IN THIS MOTION: 1701 Empire Mine Drive, Henderson, Nevada 89014-4081

NOTICE SERVED ON: Debtor(s) _____; Debtor's counsel _____; Trustee _____;

DATE OF SERVICE: _____

MOVING PARTY'S CONTENTIONS:

The EXTENT and PRIORITY of LIENS:

1st: \$90,934.05 _____2nd: _____3rd: _____4th: _____

Other: _____

Total Encumbrances: \$90,934.05 _____

APPRAISAL or OPINION as to VALUE: \$199,123.00

DEBTOR'S CONTENTIONS:

The EXTENT and PRIORITY of LIENS:

1st: \$ _____2nd: _____3rd: _____4th: _____

Other: _____

Total Encumbrances: \$ _____

APPRAISAL or OPINION as to VALUE: _____

**TERMS of MOVANT'S CONTRACT
with the DEBTOR(S):**

Amount of Note: \$184,000.00 _____

Interest Rate: 5.25000% _____

Duration: 30 years _____

Payment per Month: \$441.76 _____

Date of Default: October 1, 2015 _____

Amount in Arrears: \$16,099.12 _____

Date of Notice of Default: _____

SPECIAL CIRCUMSTANCES:

SUBMITTED BY: /s/ ARNOLD L. GRAFF(SBN 13343)

**DEBTOR'S OFFER of "ADEQUATE
PROTECTION" for MOVANT:**

- _____

- _____

- _____

- _____

- _____

- _____

SPECIAL CIRCUMSTANCES:

SUBMITTED BY: _____

SIGNATURE: _____

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13 Attorney for *Movant*
14 Bayview Loan Servicing, LLC., as servicer for THE BANK OF NEW YORK, AS TRUSTEE ON
15 BEHALF OF THE CERTIFICATEHOLDERS CWALT, INC., ALTERNATIVE LOAN TRUST
16 2004-36CB MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-36CB

17 **UNITED STATES BANKRUPTCY COURT**

18 **DISTRICT OF NEVADA**

19 In re
20 SCHULTE PROPERTIES LLC,
21 Debtor.

22 Bankruptcy Case No. 18-12734-mkn

23 Chapter 11

24 **MOTION FOR IN REM RELIEF FROM
25 THE AUTOMATIC STAY**

26 **Hearing:**

27 Date: December 12, 2018

28 Time: 9:30 A.M.

29 Bayview Loan Servicing, LLC., as servicer for THE BANK OF NEW YORK, AS TRUSTEE
30 ON BEHALF OF THE CERTIFICATEHOLDERS CWALT, INC., ALTERNATIVE LOAN
31 TRUST 2004-36CB MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-36CB¹
32 ("Movant") moves this court for an order terminating the automatic stay of 11 U.S.C. § 362(a) and
33 d(4) as to the real property located at 1701 Empire Mine Drive, Henderson, Nevada 89014-4081 (the
34 "Property"). This motion is supported by the points and authorities cited herein and the record

35 _____
36 ¹ This Motion for Relief from Automatic Stay shall not constitute a waiver of the within party's right to receive service
37 pursuant to Fed. R. Civ. P. 4, made applicable to this proceeding by Fed. R. Bankr. P. 7004, notwithstanding Aldridge
38 Pite, LLP's participation in this proceeding. Moreover, the within party does not authorize Aldridge Pite, LLP, either
39 expressly or impliedly through Aldridge Pite, LLP's participation in this proceeding, to act as its agent for purposes of
40 service under Fed. R. Bankr. P. 7004.

1 currently before the court.

2 **I. FACTUAL AND PROCEDURAL SUMMARY²**

3 On or about December 3, 2004, Melani Schulte (“Borrower”) executed a promissory note in
 4 the principal sum of \$184,000.00 (the “Note”), which was made payable to Countrywide Home
 5 Loans, Inc.. A copy of the Note is attached hereto as **Exhibit 1** and incorporated herein by reference.

6 The Note is secured by a deed of trust (the “Deed of Trust”) encumbering the Property.³ A
 7 copy of the Deed of Trust is attached hereto as **Exhibit 2** and incorporated herein by reference.

8 Movant currently holds possession of the Note, which is indorsed in blank. *See Exhibit 1*.

9 The Deed of Trust was assigned to Movant. A copy of the Assignment of Deed of Trust is
 10 attached hereto as **Exhibit 3** and incorporated herein by reference.

11 On October 11, 2009, the borrowers Melani Schulte and William Schulte (the “Borrowers”)
 12 filed prior chapter 11 case number 09-29123 (the “First Case”). On March 8, 2011, the court entered
 13 an Order Confirming an Amended Plan of Reorganization (ECF No. 834) (the “Plan”) in the First
 14 Case (ECF No. 912). The confirmed Plan from the First Case provided Bayview with a secured
 15 claim of \$80,000.00 amortized over thirty (30) years at 5.25% interest per annum (the “Secured
 16 Claim”). Principal and Interest Payments of \$441.76 were to commence 11/1/2010. On December
 17 15, 2015, Borrowers obtained a chapter 11 discharge in the First Case. (*See In Re Schulte*, 09-
 18 29123).

19 Thereafter, the Borrowers transferred their interest in the Property to Schulte Properties, LLC
 20 (the “Debtor”) herein.

21 On May 31, 2017, the Debtor filed a second chapter 11 bankruptcy case number 17-12883
 22 (the “Second Case”). However, Debtor voluntarily dismissed the Second Case on January 16, 2018.
 23 (*See In Re Schulte Properties LLC*, 17-12883).

24 On May 10, 2018, Schulte Properties LLC (“Debtor”) commenced this third and instant case
 25 by filing a voluntary petition under Chapter 11 of the Bankruptcy Code.

26

27 ² Pursuant to Rules 201(b) and 201(d) of the Federal Rules of Evidence, which are made applicable to this proceeding by
 28 Rule 9017 of the Federal Rules of Bankruptcy Procedure, Movant requests that the Court take judicial notice of the
 documents and other records on file in the this case.

28 ³ The Note and Deed of Trust are collectively referred to herein as the “Loan.”

1 A default exists under the Loan for failure to make payments due and owing under the Note
 2 and Deed of Trust.

3 As of October 24, 2018, the arrearage owed under the Note and Deed of Trust is as follows:

PAYMENTS			
<u>Number of Payments</u>	<u>Payment Amount</u>	<u>Payment Dates</u>	<u>Total</u>
37	\$441.76	10/1/2015 to 10/1/2018	\$16,345.12
			<i>Less Suspense:</i> (\$246.00)
Total Payments as of October 24, 2018:			\$16,099.12

9 An additional payment will come due on November 1, 2018, and on the 1st day of each month
 10 thereafter until the Loan is paid in full.

11 As of October 24, 2018, the total amount owed under the Note is approximately \$90,934.05.

12 In accordance with Local Rule 4001(a)(2), Movant sent a Meet and Confer letter to the
 13 parties of interest herein in an attempt to communicate in good faith regarding resolution of the
 14 instant motion. To date, Movant has been unable to resolve this matter and as a result, brings this
 15 motion. A copy of the Meet and Confer Letter is attached hereto as **Exhibit 4** and incorporated
 16 herein by reference.

17 II. LEGAL ARGUMENT

18 A. MOVANT IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY 19 PURSUANT TO 11 U.S.C. § 362(d)(4)

20 Section 362(d) of the Bankruptcy Code provides, in pertinent part:

21 On request of a party in interest and after notice and a hearing, the court shall grant
 22 relief from the stay provided under subsection (a) of this section, such as by
 terminating, annulling, modifying, or conditioning such stay –

23 (4) with respect to a stay of an act against real property under subsection (a), by a
 24 creditor whose claim is secured by an interest in such real property, if the court finds
 25 that the filing of the petition was part of a scheme to delay, hinder, or⁴ defraud
 creditors that involved either—

26 (A) transfer of all or part ownership of, or other interest in, such real property
 27 without the consent of the secured creditor or court approval; or

28 ⁴ Pursuant to the Bankruptcy Technical Corrections Act of 2010, Section 362(d)(4) was revised by striking “hinder, and” and inserting “hinder, or.”

1 (B) multiple bankruptcy filings affecting such real property.

2 11 U.S.C. § 362(d)(4). (emphasis added). If it is obvious that a debtor is attempting unreasonably to
 3 deter and harass creditors in their bona fide efforts to realize upon their securities, good faith does
 4 not exist. In re Arnold, *supra* (citing In re Thirteenth Place, Inc., 30 B.R. 503, 505 (9th Cir. B.A.P.
 5 1983)). In the absence of extraordinary circumstances, successive or serial filings for the purposes of
 6 reimposing the automatic stay, particularly when the debtor's purpose is to delay a scheduled
 7 foreclosure, should not be viewed with favor by the court. In re McKissey, 103 B.R. 189, 192
 8 (Bankr. N.D. IL 1989) (citing In re Russo, 94 B.R. 127, 129 (Bankr. N.D. IL 1988)).

9 The aforementioned multiple bankruptcy filings and unauthorized grant deed transfer have
 10 prevented Movant from lawfully exercising its state law remedies with regard to the Real Property.
 11 Debtor is not a Borrower under the Subject Loan and lacks privity of contract with Bayview, and has
 12 yet to file a Chapter 11 Plan, Disclosure Statement, or substantive motion in this Third Case.
 13 Additionally, Movant continues to incur significant legal expenses while the Borrower enjoys use
 14 and possession of the Real Property.

15 **B. MOVANT IS ENTITLED TO RELIEF FROM THE AUTOMATIC STAY
 16 PURSUANT TO 11 U.S.C. § 362(d)(1).**

17 Section 362(d)(1) provides, in pertinent part:

18 (d) On request of a party in interest and after notice and a hearing, the court shall
 19 grant relief from the stay provided under subsection (a) of this section, such as
 by terminating, annulling, modifying, or conditioning such stay-

20 (1) *For cause*, including the lack of adequate protection of an interest in
 21 property of such party in interest....

22 11 U.S.C. § 362(d)(1) (emphasis added). A lack of adequate protection is one example of "cause" for
 23 relief from stay. *In re Ellis*, 60 B.R. 432, 435 (9th Cir. BAP 1985). The lack of a sufficient equity
 24 cushion and/or a debtor's failure to tender periodic cash payments constitutes a lack of adequate
 25 protection. *See e.g.*, *In re Mellor*, 734 F.2d 1396 (9th Cir. 1984) (citation omitted).

26 As previously discussed, Borrowers have failed to tender periodic cash payments due and
 27 owing to Movant under the Note. Moreover, Movant's interest in the Property is not protected by an
 28 adequate equity cushion. Based upon the foregoing, Movant submits that Borrower is unable and/or
 unwilling to provide adequate protection to Movant and, thus, Movant is entitled to relief from the

1 automatic stay pursuant to 11 U.S.C. § 362(d)(1).

2 **III. CONCLUSION**

3 For all of the reasons discussed herein, Movant is entitled to relief from the automatic stay of
 4 11 U.S.C. § 362(a). Pursuant to Local Bankruptcy Rule 9014(g), a proposed order is attached hereto
 5 as **Exhibit 5**.

6 **WHEREFORE**, Movant respectfully prays for an Order of this court:

7 1. Terminating the automatic stay of 11 U.S.C. 362(a) to allow Movant (and any
 8 successors or assigns) to proceed under applicable non-bankruptcy law to enforce its remedies to
 9 foreclose upon and obtain possession of the Property;

10 2. This Order shall be binding and effective in any other case under the Bankruptcy
 11 Code purporting to affect the subject real property filed not later than two years after the date of
 12 entry, upon recording a copy of the order or giving appropriate notice of its entry in compliance with
 13 applicable non-bankruptcy law, except that a debtor in subsequent case may move for relief from the
 14 order based upon good cause shown after notice and hearing;

15 3. Providing that the Order is binding as to the Debtor for a period of 180 days following
 16 entry of the Order in any pending and/or subsequently filed bankruptcy case(s);

17 4. Waiving the 14-day stay prescribed by Rule 4001(a)(3) of the Federal Rules of
 18 Bankruptcy Procedure;

19 5. Permitting Movant to offer and provide Debtor with information re: a potential
 20 Forbearance Agreement, short sale, deed in lieu, loan modification, Refinance Agreement, or other
 21 loan workout/loss mitigation agreement, and to enter into such agreement with Debtor without
 22 further order of the court;

23 6. Permitting Movant to recover its reasonable attorneys' fees and costs incurred in
 24 prosecuting the instant motion by adding these amounts to the outstanding balance due under the
 25 Note, as allowed under applicable non-bankruptcy law;

26 7. That the requirements of Local Bankruptcy Rule 9021 be waived; and

27 /./

28 /./

8. Granting Movant such other and further relief as the court deems just and proper.

Respectfully submitted,

ALDRIDGE PITE, LLP

Dated: November 6, 2018

/s/ Arnold L. Graff

ARNOLD L. GRAFF
Attorney for *Movant* BAYVIEW LOAN
SERVICING, LLC., AS SERVICER FOR
THE BANK OF NEW YORK, AS
TRUSTEE ON BEHALF OF THE
CERTIFICATEHOLDERS CWALT, INC.,
ALTERNATIVE LOAN TRUST 2004-
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